

**A Megat Najmuddin bin Dato Seri (Dr) Megat Khas v
Bank Bumiputra (M) Bhd**

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–8 OF 2001(W)

**B WAN ADNAN CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK),
ABDUL MALEK AHMAD, AHMAD FAIRUZ AND MOHTAR
ABDULLAH FCJJ
8 FEBRUARY 2002**

C *Civil Procedure* — Appeal — Record of appeal — Photocopy of sealed order appealed from in record not certified true copy — Certified true copy of order in supplementary appeal record filed without leave of court — Appellant handed sealed copy of order appealed from before hearing of appeal in compliance with Court of Appeal Practice Direction No 1 of 1995 — Whether sufficient compliance — Exercise of inherent jurisdiction of court to prevent injustice — Whether defect curable under r 102 Rules of the Court of Appeal 1994 — Rules of the Court of Appeal 1994 rr 18(4)(d), (7) & 102 — Court of Appeal Practice Direction No 1 of 1995

D *Civil Procedure* — Jurisdiction — Federal Court — Appeal from Court of Appeal — Appeal from matter not decided by High Court in its original jurisdiction — Appeal from Court of Appeal grounded on defectiveness of appeal record, whether fell within s 96(a) Courts of Judicature Act 1964 — Whether all appeals from Court of Appeal appealable to Federal Court — Whether Federal Court had jurisdiction — Federal Constitution art 121(2)

E *Civil Procedure* — Practice Direction — Conflict with procedural rules of court — Practice direction substantially deviated from rules of court — Whether practice direction had force of law — Whether practice direction could supercede or amend court rules and Act of Parliament — Exercise of judicial discretion of court — Duty of Federal Court to ensure justice outweighed procedural technicalities — Rules of the Court of Appeal 1994 r 18(7) — Court of Appeal Practice Direction No 1 of 1995

G The respondent had filed an action in the High Court against the appellant who stood as guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn Bhd, the borrower. The appellant filed his defence as well as a summons in chambers for an order under O 18 r 19(1)(b) and (c) of the Rules of the High Court 1980 ('the RHC') to strike out the respondent writ's and statement of claim. The summons in chambers was part heard by the learned judge but on the date of its continued hearing, the respondent's counsel was absent. In any case, the court proceeded with the hearing and thereafter allowed the application in terms thereof. The respondent then filed two applications to first, set aside the striking out order and the second, to amend the summons in chambers. The court allowed both applications. In allowing the first application, the court ordered the matter to be reinstated for rehearing. Against that order, the appellant appealed to the Court of Appeal. Counsel for the respondent raised a preliminary objection that the appellant had not complied with r 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 ('the RCA') as the photocopy of

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the sealed order appealed against in the appeal record was not a certified true copy and as the supplementary appeal record which had incorporated the certified true copy of the order was filed without leave of the court. The Court of Appeal upheld the preliminary objection holding that the appeal record was defective and therefore, there was no proper appeal before it (see [2001] 1 MLJ 442). The appellant appealed against the decision of the Court of Appeal. Leave to appeal was granted to the appellant on the following questions: (i) whether the Federal Court had jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which was on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal; and (ii) whether the appellant who was entitled to appeal to the Court of Appeal had complied with r 18(4) and (7) of the RCA when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No 1 of 1992 (adopted for appeals to the Court of Appeal vide Court of Appeal Practice Direction No 1 of 1995).

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Held, by a majority, allowing the appeal:

- (1) (per **Steve Shim CJ (Sabah and Sarawak)**) Article 121(2) of the Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision, which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent however to note the conspicuous absence of the word ‘all’ or ‘any’ preceding the word ‘decision’ in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word ‘all’ or ‘any’ would have been included therein. The exclusion of these words was clearly deliberate. It was intended that not all decisions are appealable (see p 399E–F).
- (2) (per **Steve Shim CJ (Sabah and Sarawak)**) The Federal Court is a creature of statute. So is the right of appeal. This means that unless an aggrieved party can bring himself within the parameters of s 96(a) of the Courts of Judicature Act 1964 (‘the CJA’), no appeal lies. It is abundantly clear therefore that the Federal Court has no jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal unless such judgment, order or decision is in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction (see p 400F–G).
- (3) (per **Steve Shim CJ (Sabah and Sarawak)**) It could not be seriously said that the decision of the Court of Appeal was in

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- A** respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. The decision to dismiss by the Court of Appeal was grounded essentially on the defectiveness of the appeal record and nothing else. If the words ‘in respect of’ in s 96(a) of the CJA were to be construed to encompass such a tenuous connection, as in this case, then the court would have stretched the construction unduly wide thereby rendering ineffective the purpose of which Parliament had intended and that was to restrict civil appeals in appropriate cases to the Federal Court. The order or decision of the Court of Appeal, in the instant case, did not fall within the ambit of s 96(a) of the CJA. The Federal Court would have no jurisdiction to determine an appeal concerning such an order or decision (see p 401B–E).
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- C**
- (4) (per **Steve Shim CJ (Sabah and Sarawak)**) The Chief Justice had been empowered under r 110 of the Rules of the Federal Court 1995 (‘the RFC’) to issue practice directions. So had the President of the Court of Appeal under r 77 the RCA.
- D** Nevertheless, it could not have been the intention of Parliament that they could issue practice directions in direct conflict with procedural rules of court, which have been statutorily laid down. In the court’s view, to the extent that such practice directions are in conflict, in the sense superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever (see p 404A–B).
- E**
- (5) (per **Steve Shim CJ (Sabah and Sarawak)**) In the instant case, Practice Direction No 1 of 1995 had the effect of superceding or substantially deviating from r 18 of the RCA in particular sub-r (7). As such, it could not have any legal effect, whatsoever. To that extent, it could and should be ignored. In the circumstances, the appellant on tendering a sealed copy of the order appealed from on the hearing of the appeal in the Court of Appeal had not complied with r 18(4) and (7) of the RCA (see p 404C, E–F).
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- G**
- (6) (per **Steve Shim CJ (Sabah and Sarawak)**) However, had the Court of Appeal considered r 102 of the RCA, it would have taken note of the following salient facts; that there was no dispute as to the contents of the order appealed against; that the appellant had already filed and served the appeal record containing the photocopy of the sealed order; that the authenticity of the photocopy of the sealed order was not in dispute; that the appellant had also filed and served the supplementary appeal record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. Given those factual circumstances, it would have concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. There was no substantial miscarriage of justice involved. That being the position, the defect was
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certainly curable under r 102 of the RCA. The Court of Appeal's failure to consider r 102 had adversely affected its decision in upholding the objection of the respondent. On that basis, its decision was therefore flawed resulting in injustice to the appellant. This was a fit and proper case to invoke the inherent power of the court under r 137 of the RFC in preventing such an injustice (see p 405A–D).

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- (7) (per **Abdul Malek Ahmad FCJ**) The record of appeal was in fact in order as there was already a copy of the grounds of the judgments enclosed therein. Further, placed in the predicament the appellant was in, they had duly complied with the relevant practice direction, which had the force of law, when the certified true copy of the order, the contents of which had never been challenged, was filed in the supplementary record of appeal within a few days of receiving it without making any application, and also by tendering the copy at the hearing of the appeal after duly informing the respondent. A practice direction has the force of law and the appellant had duly complied with it (see p 419D–F, H); *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465 not followed.

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- (8) (per **Ahmad Fairuz FCJ** dissenting) The subject matter of the appeal before the court clearly fell outside the ambit of s 96(a) of the CJA. The meaning of the words used in s 96(a) is plain, clear and unambiguous. The decision of the Court of Appeal was not in respect of any matter decided by the High Court but was obviously on a matter pertaining to the rules of procedure of the Court of Appeal. The matter of non-compliance with the RCA was never a cause or matter decided by the High Court as stipulated in s 96(a). The Federal Court had no jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal, which was not in respect of any civil cause or matter decided by the High Court in its original jurisdiction (see pp 420E, 422D, 423F).

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- (9) (per **Mohtar Abdullah FCJ**) It was clear that practice directions, with no statutory authority, could not supercede the relevant court rules and the relevant Act of Parliament. But where, as in the present case, the existence of the practice direction and its reliance or compliance by a litigant had led to the litigant being punished for his reliance or compliance of the selfsame direction by the court, then surely there was a case for any judge or court to exercise judicial discretion to prevent injustice (see p 428E–F).

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- (10) (per **Mohtar Abdullah FCJ**) In the present case, the Court of Appeal was clearly wrong in upholding the preliminary objection by the respondent that the appellant had failed to obtain leave to file the supplementary record of appeal out of time. The order of striking out the appeal with cost was erroneous (see p 428F–G).

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- A** (11)(per **Mohtar Abdullah FCJ**) This was a clear case of where injustice had been done to the appellant who had been denied his right to have his appeal heard on its merit. This court had ‘inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court’ (r 137 of the RFC). Litigants who came to court and obey its directions should not be punished for such obedience. And if unfortunately, on a rare occasion a litigant is unjustly punished, this court does have the jurisdiction and the power to correct that injustice (see pp 428H–429A).
- B**
- C** **Obiter:**
- (1) (per **Mohtar Abdullah FCJ**) A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r 102 of the RCA. A fair minded judge should look at all the circumstances of the case before penalizing the party who infringes any particular rule of procedure. In this case the appellant was relying on the Court of Appeal’s own practice direction, which allowed alternative procedure for the filing and submission of the copy of the court order. The Court of Appeal should properly examine its own practice direction and consider the matter in the light of the RCA as modified by the practice direction (see p 426D–G).
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- E**
- (2) (per **Mohtar Abdullah FCJ**) The Court of Appeal Practice Direction No 1 of 1995 went beyond its administrative purview as it provided for substantial deviations from the strict procedural rules set out in r 18 of the RCA. The fault lied with the framers and issuer of the practice direction. A rule of court could not be amended by an administrative direction. Rule 18 of the RCA should have been modified and amended accordingly to accommodate the two alternative procedures sought to be introduced by the practice direction. Perhaps the Chief Justice and/or the Rules Committee might wish to review the various practice directions affecting the High Court, Court of Appeal and Federal Court and, where such directions had the effect of changing or modifying procedural rules set out in the relevant court rules, then the relevant court rules should be amended or modified accordingly (see p 428C–E).
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- H**
- (3) (per **Mohtar Abdullah FCJ**) The duty of the Federal Court, as the apex Court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seized of jurisdiction over the case. So seized, the Federal Court must decide the case in the interest of justice, to redress wrong and uphold the right, uninhibited by the technicalities strewn in its path (see p 429H).
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[Bahasa Malaysia summary]

Responden telah memfailkan satu tindakan di Mahkamah Tinggi terhadap perayu yang merupakan penjamin satu kemudahan overdraf untuk RM500,000 yang telah diberikan kepada Wira Kris Agricultural Services Sdn Bhd, iaitu peminjam. Perayu telah memfailkan pembelaan beliau dan juga saman dalam kamar untuk satu perintah di bawah A 18 k 19(1)(b) dan (c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan writ dan pernyataan tuntutan responden. Saman dalam kamar didengar sebahagiannya oleh hakim yang arif tetapi pada tarikh sambung bicaranya, mahkamah meneruskan perbicaraan dan oleh itu membenarkan permohonan seperti dipohon. Responden kemudiannya telah memfailkan dua permohonan, pertamanya untuk, mengetepikan perintah pembatalan tersebut dan kedua, untuk meminda saman dalam kamar tersebut. Mahkamah telah membenarkan kedua-dua permohonan tersebut. Dalam membenarkan permohonan pertama, mahkamah memerintahkan perkara tersebut dihidupkan semula untuk didengar semula. Perayu membantah perintah tersebut dan membuat rayuan kepada Mahkamah Rayuan. Peguam bagi pihak responden telah menimbulkan satu bantahan awal bahawa perayu tidak mematuhi k 18(4)(d) dan (7) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') kerana salinan perintah yang dimeteraikan yang dirayukan terhadapnya dalam rekod rayuan bukan salinan yang disahkan seperti yang asal dan kerana rekod rayuan tambahan yang telah memasukkan salinan perintah yang disahkan seperti yang asal telah difailkan tanpa kebenaran mahkamah. Mahkamah Rayuan telah mengekalkan bantahan awal tersebut dengan memutuskan bahawa rekod rayuan adalah cacat dan oleh itu, tiada rayuan yang betul yang dihadapkan (lihat [2001] 1 MLJ 442). Perayu telah membuat rayuan terhadap keputusan Mahkamah Rayuan. Kebenaran untuk membuat rayuan telah diberikan kepada perayu berdasarkan persoalan-persoalan berikut: (i) sama ada Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan rayuan-rayuan daripada apa-apa penghakiman, perintah atau keputusan Mahkamah Rayuan yang bukan berasal daripada Mahkamah Tinggi kecuali daripada apa-apa penghakiman, perintah atau keputusan tentang sama ada Mahkamah Rayuan patut atau tidak patut memberikan kebenaran untuk membuat rayuan kepada Mahkamah Rayuan; dan (ii) sama ada perayu yang mempunyai hak untuk membuat rayuan kepada Mahkamah Rayuan telah mematuhi k 18(4) dan (7) KMR apabila beliau memasukkan salinan perintah dimeteraikan yang dirayukan tersebut dalam perbicaraan rayuan di Mahkamah Rayuan menurut Arahan Amalan Mahkamah Agung No 1 Tahun 1992 (yang diterapkan untuk rayuan-rayuan ke Mahkamah Rayuan melalui Arahan Amalan Mahkamah Rayuan No 1 Tahun 1995).

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A **Diputuskan**, oleh majoriti, membenarkan rayuan tersebut:

- (1) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Perkara 121(2) Perlembagaan Persekutuan adalah satu peruntukan am berkaitan dengan bidang kuasa Mahkamah Persekutuan. Ia adalah satu peruntukan yang mempunyai kuasa, yang menyatakan bahawa Mahkamah Persekutuan hendaklah mempunyai bidang kuasa untuk menentukan rayuan-rayuan daripada keputusan-keputusan Mahkamah Rayuan dan Mahkamah Tinggi. Adalah penting bagaimanapun untuk diambilkira bahawa ketiadaan perkataan ‘semua’ atau ‘apa-apa’ yang ketara sebelum perkataan ‘keputusan’ dalam peruntukan tersebut. Jika adalah niat Parlimen untuk memberikan bidang kuasa ke atas Mahkamah Persekutuan untuk mendengar rayuan-rayuan daripada semua keputusan Mahkamah Rayuan, perkataan ‘semua’ atau ‘apa-apa’ akan dimasukkan di dalamnya. Pengecualian perkataan-perkataan tersebut dengan jelas disengajakan. Ia adalah diniatkan bahawa bukan semua keputusan boleh dirayuan (lihat ms 399E–F).

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- (2) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Mahkamah Persekutuan adalah badan yang dibentuk oleh statut. Begitu juga dengan hak untuk membuat rayuan. Ini bermaksud bahawa kecuali satu pihak yang terkilan boleh membawa dirinya dalam lingkungan parameter s 96(a) Akta Mahkamah Kehakiman 1964 (‘AMK’), tidak terdapat rayuan. Adalah amat jelas oleh itu bahawa Mahkamah Persekutuan tidak mempunyai bidang kuasa untuk menentukan rayuan-rayuan daripada apa-apa penghakiman, perintah atau keputusan Mahkamah Rayuan kecuali penghakiman, perintah atau keputusan demikian adalah berhubung dengan apa-apa sebab atau perkara yang telah diputuskan oleh Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya (lihat ms 400F–G).

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- F**
- (3) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Tidak boleh dikatakan dengan serius bahawa keputusan Mahkamah Rayuan tersebut adalah berhubung sebab atau perkara yang telah diputuskan oleh Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya. Keputusan untuk menolak oleh Mahkamah Rayuan adalah berdasarkan atas kecacatan rekod rayuan dan tiada lain. Jika perkataan-perkataan ‘berhubung dengan’ dalam s 96(a) AMK ditafsirkan untuk meliputi kaitan yang remeh, sebagaimana dalam kes ini, mahkamah akan melampaui hadnya tanpa sebab yang munasabah yang akan menyebabkannya tidak efektif ke atas tujuan yang telah diniatkan oleh Parlimen, iaitu untuk menghadkan rayuan-rayuan sivil dalam kes-kes yang sesuai ke Mahkamah Persekutuan. Perintah atau keputusan Mahkamah Rayuan, dalam kes sekarang ini, tidak jatuh di dalam lingkungan s 96(a) AMK. Mahkamah Persekutuan tidak mempunyai bidang kuasa untuk menentukan satu rayuan berkaitan dengan perintah atau keputusan sedemikian (lihat ms 401B–E).
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- (4) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Ketua Hakim Negara telah diberikan kuasa di bawah k 110 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk mengeluarkan arahan-arahan amalan. Begitu juga dengan Presiden Mahkamah Rayuan di bawah k 77 KMP. Meskipun begitu, bukanlah tujuan Parlimen bahawa ia boleh mengeluarkan arahan amalan yang bercanggah secara langsung dengan kaedah-kaedah mahkamah, yang telah dinyatakan melalui statut. Pada pendapat mahkamah, setakat mana arahan-arahan amalan tersebut bercanggah, di mana ia mendahului atau amat melencong daripada kaedah-kaedah statut mahkamah, arahan-arahan amalan tersebut tidak akan mempunyai apa-apa kesan undang-undang apa sekalipun (lihat ms 404A-B). A
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- (5) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Dalam kes sekarang ini, Arahan Amalan No 1 Tahun 1995 mempunyai kesan mendahului atau amat melencong daripada k 18 KMR terutamanya sub-k (7). Oleh itu, ia tidak mungkin mempunyai apa-apa kesan undang-undang, apa sekalipun. Setakat itu, ia boleh dan sepatutnya tidak dihiraukan. Dalam keadaan begini, perayu semasa memasukkan salinan perintah termeterai yang dirayukan tersebut semasa pendengaran rayuan di Mahkamah Rayuan telah tidak mematuhi k 18(4) dan (7) KMR (lihat ms 404C, E-F). D
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- (6) (oleh **Steve Shim HB (Sabah dan Sarawak)**) Namun begitu, sekiranya Mahkamah Rayuan telah mempertimbangkan k 102 KMR, ia tentu telah mengambilkira fakta-fakta penting berikut; bahawa tiada pertikaian tentang kandungan perintah yang dirayukan; bahawa perayu telahpun memfail dan menyampaikan rekod rayuan yang mengandungi salinan perintah yang termeterai; bahawa keaslian salinan perintah yang termeterai tersebut tidak dipertikaikan; bahawa perayu juga telah memfail dan menyampaikan rekod rayuan tambahan yang mengandungi salinan asal sah perintah yang termeterai tersebut dan tambahan lagi, perayu telah memasukkan salinan asal sah perintah yang termeterai tersebut semasa perbicaraan rayuan di mahkamah terbuka. Berdasarkan keadaan yang faktual tersebut, boleh disimpulkan bahawa responden tidak dikelirui atau diprejudiskan dalam apa cara meskipun terdapat kecacatan. Di sini tidak berlaku ketidakadilan. Jika begitu keadaannya, kecacatan tersebut memang dapat dipulihkan di bawah k 102 KMR. Kegagalan Mahkamah Rayuan untuk mempertimbangkan k 102 telah memberi kesan terhadap keputusannya dalam mengekalkan bantahan responden. Pada dasarnya, keputusannya tersebut cacat sehingga menyebabkan ketidakadilan kepada perayu. Ini merupakan satu kes yang sesuai dan betul untuk menggunakan kuasa sedia ada mahkamah di bawah k 137 KMP dalam membendung ketidakadilan sebegini (lihat ms 405A-D). F
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- A** (7) (oleh **Abdul Malek Ahmad HMP**) Rekod rayuan tersebut adalah teratur kerana alasan kehakiman telah dilampirkan di dalamnya. Lagipun, perayu telah mematuhi arahan amalan tersebut, yang mempunyai kuasa undang-undang, apabila salinan diakui sah perintah tersebut, di mana kandungannya tidak pernah dicabar, telah difailkan di dalam rekod rayuan tambahan beberapa hari setelah penerimaannya tanpa sebarang permohonan, dan juga dengan memberi salinan tersebut selepas memberitahu responden pada pendengaran rayuan. Arahan amalan mempunyai kuasa undang-undang dan perayu telah mematuhi (lihat ms 419D–F, H); *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465 tidak diikuti.
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- C** (8) (oleh **Ahmad Fairuz HMP** menentang) Subjek rayuan yang di hadapan mahkamah jelas berada di luar lingkungan s 96(a) AMK. Tafsiran perkataan-perkataan yang digunakan di s 96(a) adalah jelas. Keputusan Mahkamah Rayuan tidak berkenaan dengan perkara yang diputuskan di Mahkamah Tinggi, tetapi jelasnya merupakan perkara yang berkenaan dengan peraturan prosedur Mahkamah Rayuan. Perkara ketidakpatuhan KMR bukan merupakan perkara yang diputuskan oleh Mahkamah Tinggi seperti yang diperuntukkan di dalam s 96(a). Mahkamah Persekutuan tidak mempunyai bidang kuasa untuk memutuskan rayuan dari mana-mana keputusan atau perintah Mahkamah Rayuan, yang tidak berkenaan dengan perkara sivil yang diputuskan oleh Mahkamah Tinggi di dalam bidang kuasa asalnya (lihat ms 420E, 422D, 423F).
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- E**
- F** (9) (oleh **Mohtar Abdullah HMP**) Jelas bahawa arahan amalan, tanpa mempunyai kuasa statutori, tidak dapat mengatasi kaedah-kaedah mahkamah dan Akta Parlimen yang relevan. Tetapi, seperti dalam kes ini, dengan arahan amalan tersebut, yang dipatuhi oleh litigan yang membawa kepada litigan tersebut dihukum oleh mahkamah kerana beliau mematuhi arahan amalan tersebut, tentu hakim-hakim atau mahkamah akan menggunakan bidang kuasanya untuk mengelakkan ketidakadilan (lihat ms 428E–F).
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- (10) (oleh **Mohtar Abdullah HMP**) Di dalam kes ini, Mahkamah Rayuan telah khilaf dengan membenarkan bantahan awal oleh responden bahawa perayu gagal untuk memperolehi kebenaran untuk memfailkan rekod rayuan tersebut di luar tempoh masa. Perintah menolak rayuan tersebut dengan kos adalah salah (lihat ms 428F–G).
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- (11) (per **Mohtar Abdullah HMP**) Ini adalah kes yang jelas di mana ketidakadilan telah berlaku terhadap perayu yang telah ditolak hak untuk rayuannya didengar atas merit. Mahkamah ini mempunyai ‘inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court’ (k 137 KMP). Litigan-litigan
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yang dihadapkan ke mahkamah dan mematuhi arahan-arahannya tidak patut dihukum kerana telah mematuhi arahan tersebut. Dan jikalau terdapat kes di mana litigan telah dihukum dengan tidak adil, mahkamah ini mempunyai bidang kuasa dan kuasa untuk membetulkan ketidakadilan tersebut (lihat ms 428H–429A).

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Obiter:

- (1) (oleh **Mohtar Abdullah HMP**) Seorang hakim tidak sepatutnya terlalu mengikut peraturan-peraturan sehingga keadilannya dan keseksamaanya dikurangkan disebabkan oleh obsesinya untuk keteknikan peraturan-peraturan undang-undang tersebut. Hakim patut beringat akan k 102 KMR. Hakim yang saksama patut mempertimbangkan segala keadaan kes tersebut sebelum menghukum parti yang melanggar peraturan prosedur. Di dalam kes ini, perayu telah bergantung kepada arahan amalan Mahkamah Rayuan yang membenarkan prosedur yang alternatif untuk memfailkan dan menyerahkan salinan perintah mahkamah. Mahkamah Rayuan perlu mengkaji semula arahan amalannya sendiri dan mempertimbangkan perkara tersebut terhadap KMR yang telah diubahsuai oleh arahan amalan tersebut (lihat ms 426D–G).

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- (2) (oleh **Mohtar Abdullah HMP**) Arahan Amalan Mahkamah Rayuan No 1 Tahun 1995 melebihi skop pentadbirannya kerana peruntukannya menyeleweng secara substantil daripada peraturan-peraturan prosedur yang diperuntukkan dalam k 17 KMR. Kesalahan ini berpunca daripada perangka dan pengeluar arahan amalan tersebut. Kaedah 18 KMR sepatutnya diubahsuai dan dipinda untuk menyesuaikan kedua-dua prosedur yang alternatif yang diperkenalkan oleh arahan amalan tersebut. Mungkin Hakim Besar dan/atau Jawatankuasa Kaedah-Kaedah boleh mengkaji semula arahan amalan-arahan amalan yang memberi kesan ke atas Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan dan di mana arahan-arahan tersebut telah menukar atau mengubahsuai peraturan-peraturan prosedur yang diperuntukkan di dalam Kaedah-Kaedah Mahkamah yang relevan, Kaedah-Kaedah Mahkamah tersebut patut dipinda dan diubahsuai (lihat ms 428C–E).

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- (3) (oleh **Mohtar Abdullah HMP**) Kewajipan Mahkamah Persekutuan sebagai mahkamah tertinggi, adalah untuk menentukan bahawa keadilan mendapat keutamaan berbanding dari apa-apa keteknikan prosedur yang menghalang daripada keadilan. Apabila sesuatu kes dibawa ke Mahkamah Persekutuan, bidang kuasa Mahkamah Persekutuan dilaksanakan akan meliputi kes tersebut. Dengan itu, Mahkamah Persekutuan mesti memutuskan kes tersebut untuk kepentingan keadilan, untuk memperbetulkan apa-apa kesalahan dan memelihara hak-hak

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- A** parti-parti dengan tidak dihalang oleh keteknikan-keteknikan (lihat ms 429H).]

Notes

- B** For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1126–1168.
For cases on jurisdiction of the Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3706–3708.

Cases referred to

- C** *Asiah bte Abdul Manaf & Anor v Capital Insurance Bhd* [1998] 4 MLJ 361 (refd)
Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Capital Insurance Bhd v Aishah bte Abdul Manaf & Anor [2000] 4 MLJ 65 (refd)
- D** *Capital Insurance Bhd v Kasim bin Mohd Ali* [1996] 2 MLJ 425 (refd)
Capital Insurance Bhd v Kassim bin Mohd Ali [2000] 1 MLJ 193 (refd)
Chia Yan Teck & Anor v Ng Swee Keat & Anor Civil Appeal No 02–03–98(B) (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69 (refd)
Hiralal Ratan Lal v The Sales Tax Officer, Section III, Kanpur AIR 1973 SC 1034 (refd)
- E** *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 (refd)
Lee Lee Cheng(f) v Seow Peng Kwang [1960] MLJ 1 (refd)
Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166 (refd)
Morelle v Wokeling [1955] 2 QB 379 (refd)
- F** *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465 (not folld)
Raja Guppall a/l Ramasamy v Sagarani a/l Pakian [1999] 2 MLJ 677 (refd)
Yeo Peck Chie v KS Gill & Co [1946] MLJ 131 (refd)
Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 MLJ 54 (refd)
- G**

Legislation referred to

- Civil Law Act 1956 s 3(1)(a)
Court of Appeal Practice Direction No 1 of 1995
- H** Courts of Judicature Act 1964 ss 17, 68(1)(a), 96(a), (b)
Federal Constitution arts 4(1), 121(2)(c), 128(3)
Practice Direction No 1 of 1996 para 5
Road Transport Act 1987 s 96(1), (4)
Rules of the Court of Appeal 1994 rr 18(4)(d), (7), 77, 102
Rules of the Federal Court 1995 rr 110, 137
- I** Rules of the High Court 1980 O 18 r 19(1), (b), (c)
Rules of the Supreme Court 1980 r 138
Supreme Court Practice Direction No 1 of 1992

Appeal from: Civil Appeal No W02–753 of 1998 (Court of Appeal, Kuala Lumpur)

A

Su Tiang Joo (Teh Meng Teck and Richard WG Lee with him) (Cheah Teh & Associates) for the appellant.

Pawancheek bin Marican (Azhar bin Arman Ali and Md Yunos bin Shariff with him) (Wan Marican Hamzah & Shaik) for the respondent.

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Steve Shim CJ (Sabah & Sarawak):

The issues

This is an appeal against the decision of the Court of Appeal given on 20 September 2000. Leave to appeal to the Federal Court was granted to the appellant on 17 April 2001 on the following questions:

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(i) whether the Federal Court has jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court, save and except from any judgment, order or decision which is whether the Court of Appeal should or should not grant leave to appeal to it;

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(ii) whether the appellant, who is entitled to appeal to the Court of Appeal has complied with r 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 ('the RCA') when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No 1 of 1992.

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In my view, the questions concern issues which are inextricably linked. Given the manner the questions are formulated and the focus in the submissions of counsel for the parties concerned, it seems obvious that the questions have to be considered in the same sequence.

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The background facts

The factual background circumstances have been fully set out in the judgment of the Court of Appeal. Still, it is useful to restate them here but briefly. The respondent had filed an action in the High Court against the appellant, who stood as guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn Bhd, the borrower. The appellant filed his defence as well as a summons in chambers for an order under O 18 r 19(1), (b) and (c) of the Rules of the High Court 1980 ('the RHC') to strike out the respondent's writ and statement of claim. The summons in chambers was part heard by the learned judge, but on the date of its continued hearing, the respondent's counsel was absent. There was no indication as to why he was absent. Nobody seemed to care. In any case, the court proceeded with the hearing and thereafter allowed the application in terms thereof. Not surprisingly, the respondent then filed two applications. The first, to set aside the striking out order and the second, to amend the summons in chambers. The court allowed both applications. In allowing the first application, the court ordered the matter to be reinstated for

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- A rehearing. Against that order, the appellant appealed to the Court of Appeal. At the Court of Appeal, counsel for the respondent raised a preliminary objection that the appellant had not complied with r 18(4)(d) and (7) of the RCA as the photocopy of the sealed order appealed against in the appeal record was not a certified true copy, and as the supplementary appeal record which had incorporated the certified true copy of the order
- B was filed without leave of the court. After hearing the arguments, the Court of Appeal upheld the preliminary objection, holding that the appeal record was defective and therefore, there was no proper appeal before it, relying, it seems, on another Court of Appeal decision in *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] 1 MLJ 193 (*'Capital Insurance v Kasim'*). The
- C appeal was then struck out with costs.

Section 96 of the Courts of Judicature Act 1964 and art 121(2) of the Federal Constitution

- D It seems clear that the first question postulated for our consideration turns on the proper construction to be placed on s 96(a) of the Courts of Judicature Act 1964 (*'the CJA'*) in the context of the particular factual circumstances of this case. From the outset, it seems obvious the appellant was facing an uphill battle in view of the decision of the Federal Court in *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 which had followed its previous decision in *Lam Kong Co Ltd v Thong Guan*
- E *Co Pte Ltd* [2000] 4 MLJ 1. Thus, in an attempt to overcome the adversity, counsel for the appellant submitted that the Federal Court's construction of s 96(a) of the CJA in *Capital Insurance v Aishah* and *Lam Kong* was made per incuriam. Its attention was not drawn to the all encompassing scope and effect of art 121(2) of the Federal Constitution (*'the Constitution'*). He contends that the Federal Court, being the apex court, performs the vital
- F function of supervising the process of judicial law making, and as such, it must have jurisdiction to correct any erroneous decision of the Court of Appeal. Article 121(2) of the Constitution states:

There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:

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- (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
 - (b) such original or consultative jurisdiction as is specified in arts 128 and 130; and
 - (c) such other jurisdiction as may be conferred by or under federal law.

- H In emphasizing the words underscored, counsel contends that the jurisdiction of the Federal Court is enshrined in art 121(2) of the Constitution, and that having conferred upon the Federal Court such jurisdiction, no federal law can divest it. To do so, according to him, would render such federal law inconsistent with the overriding provisions of the
- I Constitution, and therefore void by virtue of art 4(1). In this connection, he argues that s 96(a) of the CJA (which prescribes the jurisdictional limits of the Federal Court in civil appeals) must be construed in a manner

consistent with art 121(2) of the Constitution. He maintains that the Federal Court in *Capital Insurance v Aishah* did not address itself to art 121(2) Constitution, and therefore had construed s 96(a) of the CJA in a manner inconsistent with the said art 121(2) of the Constitution, and thus, was void under art 4(1) thereof. In summary, he appears to take the stand that in construing s 96(a) of the CJA, the Federal Court has jurisdiction to determine appeals from all decisions of the Court of Appeal whether or not those decisions arose from causes or matters decided by the High Court in the exercise of its original jurisdiction.

The ratio in Capital Insurance v Aishah and Lam Kong

To appreciate counsel's argument, it is necessary to examine *Capital Insurance v Aishah* in depth. There, the appellant's appeal before the Court of Appeal was dismissed upon a preliminary objection raised by the respondent that the record of appeal was bad in law in that it did not contain the sealed copy of the judgment appealed from. The appellant appealed to the Federal Court. The respondent raised a preliminary objection at the leave stage contending that the Federal Court did not have jurisdiction to hear the matter on the ground that it was not an appeal against the judgment of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. That objection was summarily dismissed and leave was granted to appeal. At the hearing of the appeal, the same preliminary objection was raised by the respondent. In sustaining the preliminary objection, Mohamed Dzaiddin FCJ (as he then was) said, inter alia, at p 86:

Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of r 18(4)(d) and (7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 it is an elementary proposition that the court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the subject matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction.

In coming to this conclusion, the Federal Court adopted the same stand taken in *Lam Kong*. Because of this nexus, it may be useful to take a closer look at *Lam Kong*. There, the applicant had filed an appeal in the Court of Appeal against the decision of the High Court without first obtaining leave under s 68(1)(a) of the CJA. On a preliminary objection raised by the respondent, the Court of Appeal struck out the appeal for want of leave. The applicant appealed to the Federal Court. By a majority, the Federal Court held as follows:

- (i) that the Court of Appeal was the legal authority to decide whether or not leave to appeal was required and that decision was final and non-

- A** appealable. To hold otherwise would defeat the ‘filter principle’ reflected in the purpose or object of s 68(1)(a) of the CJA in the wake of the decision in *Auto Dunia*.
- (ii) that *Auto Dunia* decided that the order granting or refusing leave to appeal under s 68(1)(a) of the CJA by the Court of Appeal was final and non-appealable; that by analogy, the decision of the Court of Appeal as to whether or not leave was required should also be final and non-appealable.
- B**
- (iii) that unless there was an express provision that an appeal should lie from the Court of Appeal to the Federal Court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s 96(a) of the CJA, the interlocutory judgment or order of the Court of Appeal was not appealable and did not come within the meaning of s 96(a).
- C**

D It seems clear that *Capital Insurance* concerns a situation where the Federal Court was asked to deal with the decision of the Court of Appeal relating specifically to the defectiveness of the appeal record. That was the sole focus of the preliminary objection before it. In sustaining the preliminary objection raised by the respondent, the Court of Appeal held that the appeal record was defective for non-compliance of r 18(4)(d) and (7) of the RCA. Similarly, in the instant case, the same preliminary objection was raised by the respondent in the Court of Appeal, which was upheld. The Court of Appeal held that the appeal record was defective and accordingly, struck off the appeal on that basis.

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F In my view, art 121(2) of the Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word ‘all’ or ‘any’ preceding the word ‘decisions’ in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word ‘all’ or ‘any’ would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable.

G Furthermore, whilst art 121(2) of the Constitution is of general importance on the jurisdiction of the Federal Court, art 128(3) thereof is more specific. It states:

H The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

Quite clearly, the two articles have to be read in tandem. There can be no dispute that the statute conferring jurisdiction on the Federal Court concerning appeals in civil matters is the CJA.

I That is the statute envisaged in art 128(3) of the Constitution in the words ‘provided by federal law’ stipulated therein. In the CJA, the conditions of appeal are specifically provided for in s 96(a) and (b) which states:

Conditions of appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

- (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
- (b) from any decision to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.'

Now, in *Lam Kong, Mohamed Dzaidin* FCJ had occasion to touch on the breadth and scope of s 96(a) of the CJA. He said, inter alia, at pp 16–17:

It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any judgment or order of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction.

And later in his judgment, he added at p 18:

In our view, based on the above statement of principles and in the context of s 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the Court of Appeal is in respect of any civil cause or matter decided by the High Court on the merits. If a decision of the Court of Appeal made in a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case in which, following the ordinary course of things, there would only be one. Hence, the policy of requiring leave to appeal under s 96(a) to act as a filter against unnecessary appeals would be defeated.

The view expressed by his Lordship is but a mere reflection of the intention of Parliament. The Federal Court is a creature of statute. So is the right of appeal. This means that unless an aggrieved party can bring himself within the parameters of s 96(a) of the CJA, no appeal lies. It is abundantly clear therefore that the Federal Court has no jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal unless such judgment, order or decision is in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. It is within this perceptibly narrow confine that an appellant must ventilate his case. From that perspective, my answer to the first question has to be in the negative.

The decision of the Court of Appeal

This brings us to the all important question of whether the decision of the Court of Appeal, in the instant case, falls within the parameters of s 96(a) of the CJA. It cannot be gainsaid that the decision of the Court of Appeal in dismissing the appeal relates essentially in upholding the preliminary objection of the respondent on the ground that the appeal record was

- A defective for non-compliance of the RCA in juxta position to the decision of the High Court which relates pointedly to the granting of an application of the respondent to set aside the striking out order granted earlier to the appellant. Quite clearly, the decisions relate to matters which are poles apart. They are substantially different in nature. By this, I am not suggesting that the issues before the respective courts have to be on all fours with one another, but there must be some material connection between them. Here, there is none. The only tenuous connection is that the appeal record contains the notes of proceeding as well as the decision of the High Court. The connection is vague and remote. In the circumstances, it cannot seriously be said that the decision of the Court of Appeal is in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. The decision to dismiss by the Court of Appeal is grounded essentially on the defectiveness of the appeal record and nothing else. If the words ‘in respect of’ in s 96(a) of the CJA are to be construed to encompass such a tenuous connection, as in this case, then I fear we would have stretched the construction unduly wide, thereby rendering ineffective the purpose for which Parliament has intended, and that is to restrict civil appeals in appropriate cases to the Federal Court. In this connection, I would subscribe to the sentiments and observations expressed by Mohamed Dzaiddin FCJ in *Capital Insurance* and *Lam Kong*. Nothing in the arguments of counsel for the appellant has convinced me that those cases have been decided incorrectly.

- E For the reasons stated, I take the stand that the order or decision of the Court of Appeal, in the instant case, does not fall within the ambit of s 96(a) of the CJA. In that context, it can be said that the Federal Court will have no jurisdiction to determine an appeal concerning such an order or decision.

- F *Inherent powers of the Federal Court*

- G Where there is a clear case of injustice being committed, the Federal Court, as the apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r 137 of the Rules of the Federal Court 1995 (‘the RFC’). This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v Ng Swee Keat & Anor* (Civil Appeal No 02–03–98(B), when Mohamed Dzaiddin Chief Justice said, *inter alia*:

- H Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.

- I In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) of the Constitution which confers on the Federal Court ‘such other jurisdiction as may be conferred by or under federal law.’

Section 3(1)(a) under the heading ‘Application of UK Common Law, rules of equity and certain statutes’, states as follows: **A**

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —

- (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956 ... **B**

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

In 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases (see *Halsbury’s Law of England* (4th Ed) Vol 37 para 14). **C**

In this case, the appellant has complained bitterly of the injustice suffered as a result of the alleged erroneous decision of the Court of Appeal in sustaining the preliminary objection of the respondent. He has, through counsel, urged us to invoke our inherent power to prevent such injustice. **D**

Rule 18(4) & (7) of the Rules of the Court of Appeal

Given the nature of the complaint raised by the appellant, it becomes necessary to deal with the second question for which leave was granted, ie whether the appellant had complied with r 18(4) and (7) of the RCA when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Court of Appeal Practice Direction No 1 of 1995. **E**

Now, r 18(4) and (7) of the RCA stipulates: **F**

- (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —

- (a) copies of the documents in the nature or pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

- (b) a copy of the judge’s notes of the hearing of the cause or matter in which the decision appealed against was given; **G**

- (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r 101 if such documents are not in the national language, copies of certified translations thereof;

- (d) a copy of the judgment, decree or order appealed from; **H**

- (e) a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes or judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and **I**

- (f) copy of the notice of appeal.

- A** (7) The memorandum and copies above referred to which, together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the court may allow.

- B** It seems clear that whilst sub-r (4) sets out the types of documents to be attached to the memorandum of appeal which will form the record of appeal, sub-r (7) stipulates the length of time in which the said documents should be filed with the registry. Here, it is perhaps pertinent to note that all the relevant documents have to be filed at the registry 'within six weeks after the entry of the appeal or within such further time as the court may allow. This means that if a party needs further time beyond the required six weeks, he will have to apply to the court for it.
- C**

And the Court of Appeal Practice Direction No 1 of 1995 (a modified version of the Supreme Court Practice Direction No 1 of 1992) reads as follows:

- D** Di bawah peruntukan k 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu kes-kes rayuan di Mahkamah Rayuan.

Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.

- E** Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, *sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difaikan sebagai rekod rayuan tambahan tanpa sebarang permohonan.*

Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu diatas penyerahan ini. (Emphasis added.)

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- From the contents therein, it can be seen that the said practice direction deals specifically with documents falling under r 18(4)(d) of the RCA. The parts underscored are significant for our purpose. The first part provides that as soon as the appellant receives the sealed order from the High Court, it can be filed as a supplementary record of appeal without any application. The second part provides an alternative requirement, ie that the appellant is allowed to tender a copy of the judgment, decree or order appealed from on the day of the hearing of the appeal in open court.
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- H** In *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465, it was held that practice directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly, they provide guidelines for a more effective implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supercede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under s 17 of the CJA to make the rules of court.
- I**

It is true that the Chief Justice has been empowered under r 110 of the RFC to issue practice directions. So has the President of the Court of Appeal under r 77 of the RCA. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue practice directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such practice directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once practice directions have been properly and legally issued, they must be complied with. I believe that to be trite (see *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; *Raja Guppall all Ramasamy v Sagaran all Pakian* [1999] 2 MLJ 677).

This brings into focus the question of whether the alternative requirement provided in Practice Direction No 1 of 1995 has the effect of superceding or substantially deviating from r 18 of the RCA, in particular sub-r (7) thereof which, as I have said, requires all relevant documents to be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow. In respect of r 18(4)(d) of the RCA, the Court of Appeal in *Capital Insurance Bhd v Kasim* seems to have held that only the original or duplicate copies or certified true copies of those documents are acceptable. In principle, I think that is a fair proposition to take in order to avoid or prevent abuses. As mentioned earlier, the alternative requirement is one which allows an appellant to tender a copy of the judgment, decree or order appealed from on the day of hearing of the appeal in open court. The alternative requirement does not oblige the appellant to comply with the conditions set out in r 18(7) of the RCA. In my view, it has the effect of superceding or deviating substantially from those conditions. This is in conflict with r 18(7) of the RCA. As such, it cannot have any legal effect whatsoever. To that extent, it can and should be ignored. In the circumstances, I find no difficulty in holding that the appellant, on tendering a sealed copy of the Order appealed from on the hearing of the appeal in the Court of Appeal, has not complied with r 18(4) and (7) of the RCA.

Rule 102 of the Rules of the Court of Appeal 1994

That, however, does not add finality to the equation. Counsel for the appellant has submitted, in the alternative, that even if there was non-compliance of the said Rule, the defect was only a mere irregularity which was curable under r 102 of the RCA. From the very brief judgment of the Court of Appeal, it seems clear that, apart from relying on *Capital Insurance*, it had not addressed itself to this important consideration, r 102 of the RCA states:

Non-compliance of any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

- A** Had the Court of Appeal considered r 102 of the RCA, it would have taken note of the following salient facts: that there was no dispute as to the contents of the order appealed against; that the appellant had already filed and served the appeal record containing a photocopy of the sealed order; that the authenticity of the said photocopy of the sealed order was not in dispute; that the appellant had also filed and served the supplementary appeal record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. Given those factual circumstances, it would have been concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect.
- B** There was no substantial miscarriage of justice involved. That being the position, the defect was certainly curable under r 102 of the RCA. In my view, the Court of Appeal's failure to consider r 102 of the RCA has adversely affected its decision in upholding the preliminary objection of the respondent. On that basis, its decision is therefore flawed resulting in injustice to the appellant. In my view, this is a fit and proper case to invoke the inherent power of the court under r 137 of the RFC in preventing such injustice.
- C**
- D**

In the circumstances, I will allow the appeal with costs here and below. The matter is to be remitted to the Court of Appeal for rehearing on the merits.

- E Abdul Malek Ahmad FCJ:** The respondent filed their writ of summons and statement of claim at the High Court in Kuala Lumpur on 14 August 1992. After the service of the appellant's defence on the respondent and the respondent's reply on the appellant, the appellant on 29 December 1992 filed his summons in chambers to strike out the respondent's writ of summons and statement of claim.
- F** The High Court, on 21 June 1994, heard the said summons in chambers and on 27 September 1994, allowed the appellant's application by striking out the respondent's claim with costs. After the said order was perfected on 22 November 1994, the respondent, on 24 November 1994, filed a summons in chambers to set aside the High Court order dated 27 September 1994.
- G** This was heard on 9 June 1995. It was, however, adjourned when the respondent applied for leave to amend the said summons in chambers. They filed the application to do so on 20 July 1995. On 7 September 1995, the High Court ordered both parties to file written submissions. On 20 October 1998, the High Court allowed both the respondent's applications dated 24 November 1994 and 20 July 1995, set aside the order dated 27 September 1994 but ordered that costs of both applications be paid by the respondent to the appellant.
- H** The notable feature evident in examining the chronology of events in the High Court is that there had been undue delay in the hearing and decision of all the applications.
- I**

The notice of appeal in the Court of Appeal was filed by the appellant on 17 November 1998 and on 21 December 1998, the appellant was

allowed to file the record of appeal within three weeks from the date of receipt of the notes of evidence. When he received them and the grounds of judgment on 24 February 1999, he filed the record of appeal on 16 March 1999 and served it on the respondent on the same date.

A

On 30 August 2000, the appellant received the notice of hearing by facsimile that the appeal was to be heard on 18 September 2000. On the same date, the appellant applied for the certified true copies of the order appealed against. The next day was a public holiday as it was the country's national day.

B

On 1 September 2000, the appellant received the certified true copies of the order appealed against. The next day was a Saturday and, being the first Saturday of the month, was a holiday, and 3 September 2000 was a Sunday. On 4 September 2000, the appellant's solicitors prepared the supplementary record of appeal.

C

On 13 September 2000, the respondent's solicitors gave notice of a preliminary objection in that the appellant's appeal did not comply with r 18(4)(d) and (7) of the RCA. On the next day, the appellant's solicitors asked the respondent's solicitors for particulars of the preliminary objection and, after getting their response, gave written notice that a certified true copy of the order appealed against would be tendered in the Court of Appeal at the hearing of the appeal.

D

On 15 September 2000, the appellant applied for three additional certified true copies of the order appealed against which were provided on the same day. On 18 September 2000, the hearing was adjourned to 20 September 2000. A certified true copy of the order appealed against was submitted to the Court of Appeal in open court but after hearing the respondent's preliminary objection, it was allowed and the appellant's appeal was struck out with costs.

E**F**

On 17 April 2001, the Federal Court gave leave to the appellant to appeal against the whole of the decision of the Court of Appeal on 20 September 2000 on the following two questions:

- (a) whether the Federal Court has the jurisdiction to determine appeals from any judgement, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal; and
- (b) whether an appellant who is entitled to appeal to the Court of Appeal has complied with r 18(4)(d) and (7) of the RCA when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No 1 of 1992 (adopted for appeals to the Court of Appeal vide Court of Appeal Practice Direction No 1 of 1995).

G**H****I**

Rule 18(4)(d) of the RCA states that the appellant shall attach to the memorandum of appeal a copy of the judgment, decree or order appealed

A against. Rule 18(7) of the same rules provides that the memorandum and the copies referred to in the earlier subrules shall together be called the record of appeal and shall be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow.

B The preliminary objection of the respondent in the Court of Appeal was that the photocopy of the sealed order appealed against in the record of appeal was not a certified true copy and the supplementary record of appeal which contained the certified true copy of the order was filed without leave of court. Accordingly, it was their contention that both the record of appeal and supplementary record of appeal should be set aside or expunged and consequently the appellant's appeal should be struck out or dismissed with costs.

C We need to look at a number of recently decided authorities to consider the line of arguments raised here.

D In *Capital Insurance Bhd v Kasim bin Mohd Ali* [1996] 2 MLJ 425 ('*Capital Insurance*'), the respondent had obtained judgment against the driver and owner of a motor vehicle which had knocked him down. Since the judgment could not be enforced, the respondent filed a recovery action against the appellant as the insurer of the motor vehicle. The High Court granted summary judgment against the appellant for the sum claimed, interests and costs. The appellant appealed.

E The respondent's counsel filed a separate application to substitute the respondent's widow as the respondent had died pending the appeal hearing. He also filed an application by way of a preliminary objection to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with r 18(4)(d) of the RCA, as the order appealed against, dated 9 February 1995, had not been extracted and filed in the record of appeal.

F The Court of Appeal held:

- G** (a) the only way substitution could be done where a deceased had died intestate is through the widow obtaining letters of administration of her husband's estate. In this case, the widow had not yet applied for letters of administration;
- H** (b) r 18(4)(d) of the RCA requires an appellant to include in his memorandum of appeal, a copy of the judgment, decree or order appealed from. In this case, a copy of the judgment had been included in the memorandum of appeal. Since that judgment, in as much as the order, had been appealed against, there was no merit to the respondent's preliminary objection, particularly when r 18(4)(d) makes reference to 'a judgment, decree or order';
- I** (c) the respondent's cause of action against the appellant was founded under s 96(1) of the Road Transport Act 1987 ('the RTA') under which an insurer is duty bound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However, the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s 91(4) of

the RTA to the person by whom the policy has been effected. The letter from the RIMV was not evidence of any delivery of such certificate;

- (d) since it was clear that there had been no proof of delivery of the certificate of insurance as required by s 96(1) of the RTA, this in itself provided a triable issue for which the appellant had pleaded that the RIMV's letter was forged, a fact which had been confirmed by the Motor Insurers Bureau of West Malaysia.

For this appeal, we are only concerned with para (b) of that decision. The matter was remitted to the High Court for hearing. The respondent appealed to the Federal Court in *Asiah bte Abdul Manaf & Anor v Capital Insurance Bhd* [1998] 4 MLJ 361 which allowed the appeal on the ground that the proceedings in the Court of Appeal were irregular as there was no properly constituted party on whose behalf learned counsel for the respondent could act, as he was acting on a retainer that had lapsed on his client's death, and ordered that the appeal be heard by a different panel in the Court of Appeal.

It was at this second hearing at the Court of Appeal in *Capital Insurance Bhd v Kasim* when learned counsel for the respondent, as he had done in the earlier appeal hearing in the Court of Appeal, again raised a preliminary objection on the ground that the record of appeal is bad in law and ought to be set aside for non-compliance with r 18(4)(d) and r 18(7) of the RCA. This was because the record of appeal did not contain a copy of the order of the court appealed against, that the supplementary record of appeal was filed out of time and leave had not been obtained, and that the order contained in the supplementary record of appeal was only a photostated copy and not a sealed copy or a certified true copy of the sealed copy.

The appellant argued that the sealed copy of the order was filed in the supplementary record of appeal, that under the Supreme Court Practice Direction No 1 of 1992, which is applicable to the Court of Appeal with certain modifications, leave is not necessary to file the sealed copy of the order by way of a supplementary record of appeal, that the court has the discretion to cure under r 102 of the RCA, and that the appeal is by way of rehearing on its merits as ordered by the Federal Court, and the respondent should not be allowed to raise preliminary objections at that stage.

Unlike the first Court of Appeal hearing where the preliminary objection was dismissed, these arguments found favour with the Court of Appeal the second time around which decided that:

- (a) the judgment to be presented for entry must be a fair copy of the judgment and not a draft judgment, as a draft judgment is not a judgment since a draft implies that it needs perfection and approval;
- (b) although a supplementary record of appeal containing the sealed copy of the order could be filed without leave of the court, the practice direction also made it clear that the filing of it should be done as soon as the appellant received the sealed order, and since the onus is on the appellant that the supplementary record of appeal was filed soon after

- A** they received the sealed copy of the order, they had not satisfied the court that the supplementary record of appeal was filed on time, and accordingly, the failure on the part of the appellant to apply for leave to file out of time was fatal;
- B** (c) copies of the documents as envisaged by the RCA, especially in respect of those important documents must be the duplicate copies or certified true copies of the originals. Neither the original nor the duplicate or certified true copy of the sealed copy of the order is found in the supplementary record of appeal;
- C** (d) the rules and practice directions made by the court are to be obeyed and are not to be broken and parties to an appeal must adhere and comply strictly to those rules and directions. Taking into consideration the attitude of the appellant for ignoring the defects and irregularities after the respondent had pointed them out, the court could not exercise its discretion to help the appellant in regularizing the record of appeal;
- D** (e) the issue whether the record of appeal should be set aside on the ground of non-compliance with the RCA was not decided by the Federal Court. As such, the respondent had the right to raise the issue again before the court. Further, the issue of non-compliance with the rules is by itself a merit to be decided so when the record of appeal is not filed or is defective, then there is no appeal before the court as regards which the court could consider.
- E**

F In *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549, the High Court gave judgment in favour of the plaintiffs in a motor accident case. As the value of the subject matter was less than RM250,000, the defendant applied to the Court of Appeal for leave to appeal before filing its appeal, pursuant to s 68(1)(a) of the CJA. That leave application was refused.

- G** Relying on s 96(a) of the CJA, the defendant applied to the Federal Court for leave to appeal against the Court of Appeal's refusal to grant leave to appeal. The question of law which arose was whether the power to give leave to the Court of Appeal to appeal was confined exclusively to the Court of Appeal. In deciding the question, the Federal Court had to consider whether the refusal of leave by the Court of Appeal was a judgment or order within s 96(a) of the CJA so as to enable the Federal Court to entertain the application.

- H** In dismissing the appeal, Lamin PCA held that the case was in the nature of an application to the Federal Court for leave to appeal to the Court of Appeal. If an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s 68(1)(a) of the CJA, leave must first be obtained from the same court. Likewise, s 96(a) of the CJA dictates that before a notice of appeal can be filed in the Federal Court, its leave must first be obtained. In consequence, the Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal.
- I**

Edgar Joseph Jr FCJ in his judgment, decided that as both the court and the right of appeal thereto are creatures of statute, no appeal lies unless an

aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal. In that regard, there is no such provision. He reiterated that the exercise of a discretion to grant or refuse leave to appeal is not a judgment or order within the meaning of s 96(a) of the CJA.

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In *Lam Kong*, the applicant had filed an appeal to the Court of Appeal without leave in respect of a subject matter which was less than RM250,000. The Court of Appeal allowed the respondent's motion to strike out the appeal.

B

In the appeal by the applicant before the Federal Court, the respondent raised the preliminary objection that the application was misconceived because it was founded on the decision of the Court of Appeal under s 68(1)(a) of the CJA and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the CJA.

C

The majority decision, per Mohamed Dzaidin FCJ (as he then was) and Haidar Mohd Noor JCA (as he then was) was as follows:

- (a) the legal authority to decide whether leave is required or not under s 68(a) of the CJA is the Court of Appeal, and the decision of the Court of Appeal is final and not appealable as otherwise the 'filter' principle would be defeated;
- (b) in the instant appeal, the application was founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant's notice of appeal for want of leave required under s 68 of the CJA;
- (c) under s 96(a) of the CJA, the judgment or order of the Court of Appeal which is appealable to the Federal Court must be in respect of a cause of matter decided by the High Court on the merits, and not in respect of an interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it;
- (d) upon striking out the applicant's appeal in the Court of Appeal, the applicant's rights were not exhausted or shut out or, for that matter, in any way prejudiced as the applicant should have resorted to r 16 of the RCA for enlarged time to apply for leave;
- (e) by filing the present application, the applicant attempted to circumvent the said r 16 and it was an abuse of the process of the court if all remedies available under the law were not first exhausted.

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The significant difference between *Lam Kong* and that of *Auto Dunia* is that in the latter, leave to appeal to the Court of Appeal was applied for but was refused whereas in the former, no leave was obtained before filing the appeal. This is made clear in the dissenting judgment of Chong Siew Fai CJ (Sabah and Sarawak) where he said:

H

- (a) the present case may be distinguished from *Auto Dunia* because in *Auto Dunia*, it was not disputed that leave to appeal to the Court of Appeal was necessary. Hence, what the Court of Appeal had to decide

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- A** was whether to grant or to refuse leave. However, in the instant case, it was disputed as to whether leave to appeal to the Court of Appeal was necessary;
- (b) the decision of striking out or dismissal would be appealable for the issue was not whether to grant or refuse leave to appeal, which would be non-appealable, but rather whether the deciding court was right in holding that leave to appeal was necessary;
- B**
- (c) the words ‘in respect of’ in s 96(a) of the CJA means that there must be some connection or relation between the judgment or order of the Court of Appeal and the civil cause or matter decided by the High Court in the exercise of its original jurisdiction. In the instant case, there clearly was an undisputable connection or relation between the said order of the Court of Appeal and the decision of the trial judge in the High Court;
- C**
- (d) in law, where an objection to the jurisdiction of a lower court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from subsequently raising the objection. This is because the jurisdiction of a court of limited jurisdiction cannot be enlarged by any form of estoppel;
- D**
- (e) estoppel *in pais*, as a matter of law, arises when a person by his conduct or words makes a clear representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice. Here, the question of acting upon the representation to the prejudice of a party did not arise.
- E**

The case of *Capital Insurance Bhd v Kasim*, which is the second hearing in the Court of Appeal, went on appeal to the Federal Court as *Capital Insurance Bhd v Aishah*. Apparently, there is a slight difference in the name of the respondent’s widow the second time around as in the first appeal in the Federal Court, her name is given as Asiah. The respondent raised a preliminary objection in respect of the jurisdiction of the Federal Court to hear the appeal as the subject matter of the appeal was not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the CJA. It was contended that the appeal was in respect of the decision of the Court of Appeal on a preliminary objection taken up on behalf of the respondent before the hearing of the appeal on the merits.

- H** The Federal Court agreed and dismissed the appeal. The judgment of only two members of the panel dated 28 July 2000, as the third member had since retired earlier in that same month, also held that since the preliminary objection related to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by the court, the respondents were entitled to raise this preliminary objection and the court could entertain it.
- I**

- A** or order appealed against on the date of hearing of the appeal in open court and the respondent is to be accordingly informed of this.

Learned counsel also submitted that the Court of Appeal has no original jurisdiction and any order made by it must of necessity be in the discharge of its appellate jurisdiction. In that respect, he added, the Federal Court had failed to consider arts 121 and 128 of the Constitution. He said that s 96(a) of the CJA cannot be construed to ascertain whether there is jurisdiction on the part of the Federal Court to determine appeals from the decision of the Court of Appeal.

- B**
- C** It was the suggestion of learned counsel that the matter could be referred back to the Court of Appeal to be heard on the merits as was done the first time in *Capital Insurance*. However, given all the circumstances, he submitted that the Federal Court has the jurisdiction to hear the appeal and that the appeal should be allowed and the order of the Court of Appeal be set aside as both questions should be answered in the positive.

- D** Learned counsel for the respondent, in answer to the submissions of learned counsel for the appellant as regards jurisdiction, referred to *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1, where the Court of Appeal at p 3 stated:

- E** Clause 77 of the Agreement provides that the Supreme Court shall be a court of unlimited jurisdiction, that it shall consist of a High Court and a Court of Appeal and that its constitution, powers and procedure may be prescribed by Federal Ordinance. Clearly, here ‘jurisdiction’ must mean something different from ‘power’. Jurisdiction is unlimited. But unlimited jurisdiction cannot mean unlimited power because as regards the powers of the court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed.
- F** This leads to the conclusion that the expression ‘jurisdiction’ is used as meaning the authority of the court to exercise any judicial power that is given to it by the law and that when the clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires power to be exercised.

- G** It was the contention of learned counsel for the appellant that this court has the jurisdiction to determine appeals from any judgment or order of the Court of Appeal which did not originate from the High Court, save and except from any judgment or order of the Court of Appeal which decides whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal.

- H** This is enshrined in art 121(2) of the Constitution, and any interpretation of s 96(a) of the CJA and any other Act of Parliament which is inconsistent with that article is void under art 4(1) of the Constitution, it being the supreme law of the Federation.

- I** As an apex court, he added, the Federal Court performs the vital function of supervising the process of judicial law making which is an integral part of the common law system and hence the Federal Court has the jurisdiction to correct any erroneous decision of the Court of Appeal

except for any decision refusing leave to appeal under s 68(1)(a) of the CJA, following the filter principle enunciated in *Auto Dunia*. **A**

However, learned counsel argued, the Court of Appeal's decision on a procedural point raised in the Court of Appeal for the first time is still appealable subject only to leave being granted by the Federal Court. In the instant case, leave has in fact been granted. **B**

Section 96 of the CJA provides:

Conditions of appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court: **C**

- (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
- (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision. **D**

As for para (a), learned counsel reiterated that even if the appeal here is held not to fall under the first limb, it could still come under the second limb in which this court's jurisdiction is unfettered so long as it satisfies the 'question of importance' and 'public advantage' test. My immediate response to this argument would be because of the word 'involving' joining the two limbs, they cannot be separately applied. **E**

Learned counsel stressed that the Court of Appeal was certainly in error in failing to consider that the appellant had complied with r 18(4)(d) and r 18(7) of the RCA when he tendered a sealed copy of the order appealed from in open court before the hearing of the appeal in the Court of Appeal pursuant to the Supreme Court Practice Direction No 1 of 1992 as adopted for appeals in the Court of Appeal vide Court of Appeal Practice Direction No 1 of 1995. **F**

He added that the facts in *Capital Insurance v Kasim* the second time around were distinguishable as the appellant here, in making use of the alternative procedure, relied on the second limb of the Supreme Court Practice Direction No 1 of 1992 which allows the appellant to tender a copy of the sealed order appealed against in open court on the hearing date of the appeal, unlike the earlier case which only relied on the first limb of the relevant practice direction. **G**

He continued his submissions by stating that as provided in Part IV of the RCA at r 104, any objections to irregularity shall be stated in the summons or notice of motion for either non-compliance with the rules or to set aside any proceedings for irregularity under rr 102 and 103 of the RCA respectively. The Court of Appeal should not have entertained the preliminary objection here orally and the delay in making the objection is fatal. In any case, he argued that the so called defect is a mere irregularity curable under r 102 of the RCA. **H**
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- A** Further, he reiterated that the so called irregularities are not prejudicial to the respondent for the following reasons:
- (a) there is absolutely no dispute over the contents of the order appealed against;
 - B** (b) the appellant has already filed and served the record of appeal which contained a photocopy of the sealed order appealed against and the genuineness of the said photocopy was never in dispute;
 - (c) the appellant had also filed and served the supplementary record of appeal which contains the certified true copy of the sealed order appealed against;
 - C** (d) in addition, the appellant had in fact tendered a certified true copy of the sealed order appealed against on 20 September 2000 in open court when the appellant's appeal was called up; and
 - (e) thus, the respondent has not been misled as to what the order appealed against was nor in any way prejudiced by the fact that a photocopy of the sealed order appealed against was included in the
 - D** record of appeal.

E Learned counsel also submitted that the Federal Court has the jurisdiction to correct any erroneous decision of the Court of Appeal, with the exception of any decision refusing leave to appeal under s 68(1)(a) of the CJA of which the filter principle as enunciated in *Auto Dunia* would apply. The jurisdiction cannot be curtailed as it is crucial for an effective check and balance system to operate. Otherwise, there could well be a situation where the Court of Appeal may arrive at a different decision from that of the Federal Court, resulting in uncertainty of the law, especially procedural law.

F For instance, if the Federal Court has a limited supervisory role over the Court of Appeal, the Court of Appeal may formulate erroneous decisions regarding the RCA, and the Federal Court would be powerless to set the law right. Similarly, any purported exercise of discretion by the Court of Appeal pursuant to the RCA, even if wrongfully and improperly exercised, would never be subject to the Federal Court's scrutiny and review.

G The reply from learned counsel for the respondent was that during the argument at the leave stage on 17 April 2001, they had contended that the application for leave by the appellant was improper under s 96(a) of the CJA, but it was dismissed.

H That, however, did not prevent him from raising it again as this court has no jurisdiction to hear the appeal. This was because this court did not decide the issue of jurisdiction on the merits at the leave stage. Instead, this court considered the appropriateness of matters raised for appeal becoming the subject of appeal.

Reliance was made on *Capital Insurance Bhd v Aishah* where the court held:

I In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the

preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application.

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Reverting to the facts on this case, learned counsel for the respondent submitted that the respondent had filed the action against the appellant as guarantor to a RM500,000 overdraft facility granted to Wira Kris Agricultural Services Sdn Bhd. The appellant filed his defence and also applied to strike out the respondent's writ by way of summons in chambers.

B

The application was part heard but the learned counsel for the respondent was absent at the continued hearing on 17 September 1994. The High Court proceeded with the matter and gave order in terms of the appellant's application.

C

The respondent then filed an application to set aside the order granted and also to amend the summons in chambers. On 20 October 1998, the court allowed both applications, and for the first application, reinstated the matter for rehearing. The appellant accordingly appealed to the Court of Appeal.

D

It was not disputed in the Court of Appeal that the record of appeal was filed within time but it did not include a sealed copy of the order granted on 20 October 1998. The appellant had also not obtained the leave of the court to include a sealed copy of the order in the supplementary record of appeal.

Learned counsel for the appellant's argument was that it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of the appeal which he had done in compliance with the Supreme Court Practice Direction No 1 of 1992.

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However, the Court of Appeal disagreed with him as the appellant had failed to obtain leave to file the supplementary record of appeal out of time. They upheld the preliminary objection and since there was no proper appeal before it, struck out the appeal with costs.

F

Learned counsel for the respondent reiterated that the subject matter of this appeal was not 'any civil cause or matter decided by the High Court in the exercise of its original jurisdiction' as it relates to an issue arising from a preliminary objection raised by the respondent at the hearing before the Court of Appeal. Accordingly, it does not fall within the ambit of s 96(a) of the CJA.

G

In *Lam Kong*, the majority judgment of the Federal Court said at p 17:

On the true construction of s 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it. Unless there is an express provision that an appeal shall lie from the Court of Appeal to this court from its interlocutory judgment or order in respect of a matter pending appeal before it, by necessary intendment of s 96(a) the interlocutory judgment or order of the Court of Appeal is appealable and does not come within the meaning of s 96(a) of the Act.

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A In another part of the judgment, they held at p 18:

In our view, based on the above statement of principles and in the context of s 96(a) of the Act, it is laudable, as a matter of policy, to restrict the right of appeal from the Court of Appeal to the Federal Court with leave only to cases where the judgment or order of the court of appeal is in respect of any civil case or matter decided by the High Court on the merits. If a decision of the Court of Appeal made on a motion in a pending appeal is appealable, then the result would be that there would be two appeals in every case ‘in which, following the ordinary cause of things, there would only be one’. Hence, the policy of requiring leave to appeal under s 96(a) to act as a ‘filter’ against unnecessary appeals would be defeated.

B

C Learned counsel for the respondent remarked that the question of injustice would not be the proper test. Even if the court considers that to be the test, the background of the case determines whether the appellant is indeed prejudiced. In this case, the appellant is not at all prejudiced for the simple reason that the striking out of the application in the High Court is still due for rehearing pursuant to the decision of the High Court judge when he

D ordered the setting aside of the earlier order to strike out. The appellant’s rights are not exhausted or shut out or in any way prejudiced as he can still proceed to argue his case at the rehearing before the High Court.

As for the second limb of s 96(a) of the CJA, learned counsel for the respondent referred to the judgment in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257, where the relevant extract reads:

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To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant:

- F**
- (1) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
 - (2) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal.
- G**

Learned counsel reminded us that this issue is not being decided for the first time in view of the decision in the two earlier *Capital Insurance* cases. Here, the appellant made no attempt to file or to get leave to file a supplementary record of appeal containing a sealed or a certified true copy of the order appealed against. It is obvious, he added, that the Court of Appeal had already considered the effect of the second limb of s 96(a) of the CJA. In any case, he submitted, practice directions have no statutory authority.

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Rule 18(4)(d) of the RCA clearly states that the appellant shall attach to the memorandum of appeal a copy of the judgment, decree or order appealed from. On this point, I would readily agree with the decision of the Court of Appeal in *Capital Insurance* the first time around, although I am aware that only a draft judgment was enclosed there, when it held that since the relevant provision refers to ‘a copy of the judgment, decree or order’,

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and a copy of the judgment has in fact been attached to the memorandum of appeal and is part of the record of appeal here, that rule has been complied with although a copy of the order has not been so included. As decided in that case, there is certainly no merit to the preliminary objection. Things, of course, would be different if the words were 'a copy of the judgment, decree and order'.

Rule 18(7) of the RCA provides that the memorandum of appeal and the copies of the documents specified in r 18(4) thereof shall be called the record of appeal and shall be filed at the registry within six weeks after the entry of the appeal or within such future time as the court may allow. Since a copy of the judgment has been included in the record of appeal, and since it was filed within the three weeks allowed on 21 December 1998, from the date of receipt of the notes of evidence and the grounds of judgment, there cannot be any doubt that the record of appeal is in order.

On these grounds alone, the preliminary objection fails.

However, in view of the respondent's persistence on this preliminary objection, let us just say that a copy of the judgment was also not included in the record of appeal. As the learned counsel for the appellant has argued, they were relying on the relevant practice direction which is the Supreme Court Practice Direction No 1 of 1992 dated 17 June 1992.

The same provisions have been modified for the Court of Appeal vide their Practice Direction No 1 of 1995 dated 24 June 1994. If we were to revert to the sequence of events in this appeal, it is crystal clear that the appellant has followed the practice direction to the letter.

But the Supreme Court decision in *Ooi Bee Tat* held that unlike standing orders which are made pursuant to relevant Acts, and which are similar to subsidiary legislation and therefore have the same status as the Rules of the Supreme Court or the Rules of the High Court, practice notes or practice directions have no statutory authority. Practice directions are merely directions for administrative purposes.

In that same month, the Court of Appeal in *Yeo Yoo Teik* decided that although Practice Direction 2/91 does not have the force of law, it must be strictly adhered to as it has been especially framed to regulate the procedure governing the filing of the records of appeal. Three years later, the Court of Appeal in *Raja Guppal a/l Ramasamy* was of the view that the provisions of Practice Direction No 1 of 1996 must be strictly followed to ensure that there is a systematic and consistent procedure governing the filing of the records of appeal. It further ruled that the conduct of the appellant's solicitor in not complying with that practice direction was not an acceptable explanation for the delay in filing the record of appeal. Four months before that, the Court of Appeal in *Ling Siok Seng v Ting Sieh Chung* [1998] 4 MLJ 65 said that as regards the fact that the appellant had still not received the notes of proceedings, the appellant should have complied with the Court of Appeal Practice Direction No 1 of 1996 and there was no evidential material to explain the appellant's failure to do so. Even in the *Capital Insurance v Kasim*'s appeal in the Court of Appeal the second time around, the court had ruled that rules and practice directions made by the court are

- A** to be obeyed and not to be broken and parties to an appeal must adhere and comply strictly to those rules and directions.

Apart from the reassuring findings of the four Court of Appeal decisions, I would venture to say that the decision in *Ooi Bee Tat* cannot be correct. This is because practice directions would have the force of law as they are made under the relevant rules. Rule 77 of the RCA states:

- B** The President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

Rule 138 of the Rules of the Supreme Court 1980, by which the present facts of this case are governed, provides:

- C** The Lord President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

In fact, even with that being repealed by the RFC, r 110 thereof has a similar provision which reads:

- D** The Chief Justice may from time to time give such directions with respect to the business in the Registry, he may consider necessary.

Having analyzed the relevant authorities and considered the arguments for the reasons stated earlier, it is my view that the record of appeal was in fact in order as there was already a copy of the grounds of judgment enclosed therein. Further, placed in the predicament the appellant was in, they had duly complied with the relevant practice direction, which I hold to have the force of law, when the certified true copy of the order, the contents of which had never been challenged, was filed in the supplementary record of appeal within a few days of receiving it without making any application, and also by tendering the said copy at the hearing of the appeal after duly informing the respondent.

- E**
- F**
- G** In view of the words ‘save and except from’ appearing therein, I am somewhat perplexed by the first question posed as there are two limbs and reading it once results in it sounding ambiguous. One cannot be sure which limb is supposed to be the exception to the other. Taken as a whole, it does not seem to make any sense. It would have sufficed if the question was framed to cover the second limb only as it should be clear that the first limb is accepted to be in the negative in view of the law while the second limb forms the exception. On the other hand, the words ‘save and except from’ could be taken to mean ‘other than’, which then makes the first limb the exception. Whichever limb is taken to answer the question posed, my answer would be in the negative as either one goes against the grain of s 96 of the CJA and the decided authorities discussed earlier. For the second question, my answer would be in the positive as I hold that a practice direction has the force of law and the appellant has duly complied with it.

- H**
- I** Accordingly, I would allow the appeal with costs here and in the Court of Appeal. The deposit is refunded to the appellant. The matter is remitted back to the Court of Appeal before another panel for a rehearing on the merits.

Ahmad Fairuz FCJ: On 17 April 2001, the appellant was granted leave to appeal to this court on the following questions:

- (i) whether the Federal Court has the jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court, save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal;
- (ii) whether an appellant who is entitled to appeal to the Court of Appeal has complied with r 18(4)(d) and (7) of the RCA when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No 1 of 1992 (adopted for appeals to the Court of Appeal vide Court of Appeal Practice Direction No 1 of 1995).

The appeal by the appellant was against the decision of the Court of Appeal which upheld the preliminary objection of the respondent. The thrust of the objection was the non-compliance by the appellant of r 18(4)(d) and (7) of the RCA when he included in the appeal record the photocopy of the sealed order appealed against and when he filed without leave of the court the supplementary appeal record that incorporated in it the certified true copy of the order. Consequently, the Court of Appeal held that the appeal record was defective and as such there was no proper appeal before it. The appeal was then struck out with costs. It is clear, at this stage, that the decision of the Court of Appeal is not ‘... in respect of any civil cause or matter decided by the High Court ...’, but is obviously on a matter pertaining to the rules of procedure of the Court of Appeal. The matter of non-compliance with the RCA is never a cause or matter decided by the High Court as stipulated in s 96(a) of the CJA.

That section reads:

Conditions of appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

- (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage;

In *Capital Insurance Bhd v Aishah*, the Federal Court was also then considering a similar case of non-compliance of r 18(4)(d) and (7) of the RCA. Rule 18(4)(d) states:

The appellant shall attach to such memorandum copies of the proceedings in the High Court, including

- ...
- (d) a copy of the judgment, decree or order appealed from;
- ...

A Rule 18(7) says:

The memorandum and copies above referred to which, together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the court may allow.

B The appeal record in that case did not contain the sealed copy of the judgment of the court below and a copy of the order of the court. On the appeal before it, the Federal Court said at p 68:

Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of r 18(4)(d) and (7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549, it is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the subject matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. (Emphasis added.)

E The Federal Court then made reference to its earlier decision in the case of *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, wherein the Federal Court (in a majority decision) held that ‘the judgment or order of the Court of Appeal which is appealable to the Federal Court must be in respect of a cause or matter decided by the High Court on the merits and not in respect of an interlocutory judgment or order decided by the Court of Appeal upon the hearing of an application made to it in a pending appeal before it.’ *Lam Kong* involves an appeal filed in the Court of Appeal without leave of the court. Leave was necessary under s 68(1)(a) of the CJA as the value of the subject matter of the appeal was less than RM250,000. The Court of Appeal had allowed the respondent’s application to strike out the appeal. The applicant then appealed to the Federal Court against that decision.**G** Before us, the learned counsel for the appellant argued that the interpretation of s 96(a) of the CJA by the Federal Court in *Capital Insurance Bhd v Aishah* was made per incuriam. This meant, contended the appellant, that the interpretation was made, in the words of Sir Raymond Evershed MR in *Morelle v Wokeling* [1955] 2 QB 379 at p 406, ‘in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned, so that in such cases, some part of the ‘interpretation’ or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong’. The learned counsel submitted that the interpretation is inconsistent with art 121(2) of the Constitution. That article reads:**I** There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:

- (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof; **A**
- (b) such original or consultative jurisdiction as is specified in arts 128 and 130; and
- (c) such other jurisdiction as may be conferred by or under federal law.

And, by virtue of art 4(1) of the Constitution which says: **B**

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

the interpretation is, according to counsel, void. **C**

In response to this argument of the appellant, the learned counsel for the respondent referred us to art 128(3) of the Constitution which clearly says that ‘the jurisdiction of the Federal Court to determine appeals from the Court of Appeal ... shall be such as may be provided by federal law.’ And the CJA is such a federal law (see *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 at p 167). Thus, I agree with the respondent that art 121(2) of the Constitution must be read subject to art 128(3) of the Constitution (see Andrew Harding’s *Law, Government and the Constitution in Malaysia* at p 128). As I had stated earlier, the subject matter of the appeal now before us clearly falls outside the ambit of s 96(a) of the CJA. To me, the meaning of the words used in s 96(a) of the CJA is plain, clear and unambiguous. The Supreme Court of India in *Hiralal Ratan Lal v The Sales Tax Officer, Section III, Kanpur* AIR 1973 SC 1034 at p 1039 had said: **D**

In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is *unambiguous* and if from that provision, the legislative intent is clear, *we need not call into aid* the other *rules of construction* of statutes. The other rules of construction of statutes are called into aid only when the legislative intent is not clear.’ (Emphasis added.) **E**

Our Federal Court, in the case of *PP v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 at p 275 said: **G**

Thirdly, if the lawmaker so amends the law, to paraphrase the words of Lord Diplock at p 541 in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the lawmaker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous *it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral*; or to paraphrase the words of Lord Scarman at p 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. *Even if the result be unjust but inevitable*, **H**

I

- A** *he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.* (Emphasis added.)

In the case of *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 at p 70, the Federal Court said:

- B** It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. *Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction* and the second is said to be to construe the phrases and sentences according to the rules of grammar.
- C** *'It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed.'* per Bayley J in *R v Ramsgate (Inhabitants)* (1827) 6 B&C 712.' (Emphasis added.)

In 1946, Willan CJ in *Yeo Peck Chie v KS Gill & Co* [1946] MLJ 131 at p 133 said:

- D** *In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words.* If an authority is required for this, it will be found in the case of *Abbott v Middleton* (1858) 7 HL Cas 114]. *Once the literal meaning has been established then, however unjust, arbitrary or inconvenient such meaning may be, it must receive its full effect— see Biffin v Yorke* 5 Man & G 428. Nor is it the function of the court to scan the wisdom or policy of a statute — see *May v The Great Western Railway Co* 41 LJQB 104. (Emphasis added.)
- E**

In the light of the aforementioned authorities, I am satisfied that the literal meaning of the words used in s 96(a) of the CJA is very clear. I find no ambiguities in s 96(a) of the CJA. As such, the answer to question (i) has to be that the Federal Court has no jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which is not in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. And as the subject matter of question (ii) has nothing to do with the civil cause or matter decided by the High Court in the exercise of its original jurisdiction, I would be contradicting myself with what I had held in my answer to question (i) if I were to proceed to consider the second question. In the circumstances, I would dismiss the appeal with costs.

- G**
- Mohtar Abdullah FCJ:** This is a simple case and the facts have been plainly set out in the Court of Appeal judgment delivered by Mohd Saari JCA ('the learned JCA') as follows:
- H**

In this appeal, the first defendant ('the appellant') is dissatisfied with the order of the High Court granted on 20 October 1998.

Factual background

- I** The respondent filed this action against the appellant who stood as a guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn Bhd ('the borrower'). The appellant filed his defence and also filed his summons in chambers ('SIC') for an order under

O 18 r 19(1)(b) and (c) of the RHC to strike out the respondent's writ and statement of claim.

A

SIC was part heard but on the date of its continued hearing on 17 September 1994, the respondent's counsel was absent. The court proceeded with the hearing and granted the application to strike out the respondent's writ and statement of claim.

Subsequently, the respondent filed two applications:

B

- (i) an application to set aside the order granted on 17 September 1994;
- (ii) an application to amend SIC (encl 16).

On 20 October 1998, the court allowed both applications. Against that order, the appellant appeals to this court.

It is not in dispute that the main appeal record was filed within time, which appeal record did not include the sealed copy of the order granted on 20 October 1998. From the last date of filing the appeal record to this date (20 September 2000), there is a lapse of about 1½ years.

C

The learned counsel for the respondent raised a preliminary objection on the ground that the appellant had not obtained leave to include in the appeal record the sealed copy of the court order granted on 20 October 1998.

D

Issue

Issue for determination is whether the appeal is properly heard before the court.

After referring to the provisions of r 18(4) and (7) of the RCA, the learned JCA noted the argument of the appellant that for the purpose of tendering the sealed copy of the court order, it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of the appeal in the Court of Appeal, as provided for in Practice Direction No 1 of 1992. The learned JCA referred to the Court of Appeal decision in *Capital Insurance Bhd v Kasim*, at pp 200–201:

E

It is clear to us that the practice direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of the evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere is it stated in the practice direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant to show that the supplementary appeal record was filed soon after it received the sealed copy of order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the supplementary appeal record at any time it likes just because of the practice direction. *In our view whatever supplementary appeal record to be filed pursuant to that practice direction, it must be done within the stipulated time otherwise leave of the court must be obtained.* In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for leave to file out of time is fatal. (Emphasis added.)

F

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I

Relying on the abovementioned judgment, the learned JCA then made the following decision:

- A** On the facts of the instant case, as the appellant had failed to obtain leave to file supplementary record of appeal out of time, we upheld the preliminary objection by the respondent. Consequently we held that there was no proper appeal record before us to consider. This appeal was struck off with costs.
- B** The result of this simple case has a not so simple consequence on the rights of the appellant to pursue his appeal on the merits in the Court of Appeal, and thereafter to the Federal Court. The appellant successfully obtained leave of the Federal Court to appeal against this decision of the Court of Appeal on two questions of law as follows:
- C** (i) whether the Federal Court has the jurisdiction to determine appeals from any judgment, order or decision of the Court of Appeal which did not originate from the High Court save and except from any judgment, order or decision which is on whether the Court of Appeal should or should not grant leave to appeal to the Court of Appeal; and
- D** (ii) whether an appellant who is entitled to appeal to the Court of Appeal has complied with r 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the Court of Appeal in compliance with the Supreme Court Practice Direction No 1 of 1992 (adopted for appeals to the Court of Appeal vide Court of Appeal Practice Direction No 1 of 1995).
- E**

I will deal with the second question first. Let us examine the provisions relevant to this question, viz r 18(4) and (7) of the RCA and the Supreme Court Practice Direction No 1 of 1992/Court of Appeal Practice Direction No 1 of 1995.

- F** Rule 18 of the RCA sets out the various procedural requirements that must be complied with in the preparation of a memorandum of appeal.

Rule 18(4) of the RCA provides:

- (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:
- G**
- (a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;
- (b) a copy of the judge's note of the hearing of the cause or matter in which the decision appealed against was given;
- H**
- (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r 101 if such documents are not in the national language, copies of certified translations thereof;
- (d) a copy of the judgment, decree or order appealed from;
- I**
- (e) a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the

time limited for filing the record of appeal, provided that if the court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and

- (f) a copy of the notice of appeal.

Rule 18(7) of the RCA further provides:

The memorandum and copies above referred to, which together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the court may allow.

It is very clear from these provisions of the RCA that the relevant documents, including the copy of the court order dated 20 October 1998 (the order appealed against) must be filed by the appellant within six weeks after the entry of the appeal or 'within such further time as the court may allow' which means, of course, that the appellant must apply to the Court of Appeal for leave to file the relevant document out of time. In short, on the facts of the present case, the appellant who has filed everything in time, except for that copy of the court order, must apply to the court for leave to file the said court order out of time. Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence to the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. The judge should be mindful of r 102 of the RCA which provides that 'non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void.' The said rule also provides for the discretionary power of the judge to deal with such irregularity 'in such manner and upon such terms' as the judge thinks fit. Therefore, a fair minded judge should look at all the circumstances of the case before penalizing the party who infringes any particular rule of procedure. After all, r 18(7) of the RCA itself provides an avenue for the appellant to apply to the court for an extension of time. If the appellant fails to do so, he should not be peremptorily dismissed. The court should consider why the appellant acted in the manner he did. In this case, the appellant was relying on the Court of Appeal's own practice direction which allows alternative procedures for the filing or submission of the copy of the court order. The Court of Appeal should properly examine its own practice direction and consider the matter in the light of the RCA as modified by the practice direction.

The strict procedural requirements of r 18 have been mitigated by the Court of Appeal Practice Direction No 1 of 1995 (adopting and modifying the Supreme Court Practice Direction No 1 of 1992) which, with the relevant modifications, now reads as follows:

Di bawah peruntukan Kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam rekod rayuan.

- A** Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
- Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, *sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.*
- B** *Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu di atas penyerahan ini.* (Emphasis added.)
- C** The Court of Appeal itself has recognized that most appellants have not complied with the provisions of r 18(4)(d) and (7) of the RCA which requires a copy of the judgment, decree or order to be included in the record of appeal which must be filed within six weeks after entry of the appeal. Therefore, in order to overcome this problem and to expedite the appeal process in the Court of Appeal, the practice direction provides that as soon as the appellant receives the sealed order from the High Court, the said order can be filed as a supplementary record of appeal sans application, ie there is no necessity for the appellant to file any application to submit the court order as a supplementary record of appeal. Let me pause here. The phrase ‘as soon as the appellant receives the sealed order from the High Court’ (‘sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi’) does not come with any qualifying time frame — the court order may well be received within the six week period for filing the record of appeal or, as commonly happens, it may have been received after the expiry of the said period. It must be stressed that the practice direction addresses the specific problem of delay in obtaining and filing copies of judgment, decree or order — a delay that invariably emanates from the court (the judge or the registry). The appellant cannot be penalized for any delay on the part of the court to issue the sealed order. It is trite law. This particular practice direction is the common sense solution to expedite the appeal process, to overcome delay caused in the first place by the court’s own delay in issuing the relevant judgment, decree or order required to be filed in the record of appeal. In effect, the practice direction modifies the procedure in r 18 of the RCA in the special case of documents specified in r 18(4)(d) only. In respect of such documents there is clearly no necessity to make an application for leave to file the supplementary record of appeal. The phrase ‘bolehlah difailkan ... tanpa sebarang permohonan’ is exceedingly clear: to impose a requirement for ‘permohonan’ for leave to file such a supplementary record would be to negate what the practice direction seeks to remedy. The Court of Appeal, on several occasions, has observed that although practice directions have no statutory authority or force of law, they must be strictly adhered to as they have been specially framed to regulate specific procedures such as the filing of appeal records, etc (see the cases of *Yeo Yoo Teck*, *Ling Siok Seng* and *Raja Guppall a/l Ramasamy*).
- I** The alternative procedure set out in the practice direction provides an even simpler solution to the problem: ‘Sebagai alternatif, perayu dibenar

menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka'. As an alternative, the appellant is allowed to submit a copy of the judgment, decree or order appealed against on the day of hearing of the appeal in open court. The only qualification is the professional ethical requirement of informing the respondent accordingly. This aspect of the practice direction was not dealt with by the Court of Appeal in *Capital Insurance Bhd v Kasim* and was similarly overlooked by the learned JCA in this case.

As the then Supreme Court noted in *Ooi Bee Tat*, practice directions are directions for administrative purposes and have no statutory authority. They are framed to provide administrative guidelines for the proper implementation of the procedural rules. They help to clarify or highlight existing rules for proper compliance of the said rules as set out in the relevant court rules or the relevant Act of Parliament. The problem is that this particular Court of Appeal Practice Direction No 1 of 1995 goes beyond its administrative purview as it provides for substantial deviations from the strict procedural rules set out in r 18 of the RCA. The fault lies with the framers and issuer of the practice direction. A rule of court cannot be amended by an administrative direction. Rule 18 of the RCA should have been modified and amended accordingly to accommodate the two alternative procedures sought to be introduced by the said practice direction. Perhaps, the Chief Justice and/or the Rules Committee might wish to review the various practice directions affecting the High Court, Court of Appeal and Federal Court and, where such directions have the effect of changing or modifying procedural rules set out in the relevant court rules, then the relevant court rules should be amended or modified accordingly. It is clear that practice directions, with no statutory authority, cannot supercede the relevant court rules or the relevant Act of Parliament. But where, as in the present case, the existence of the practice direction and its reliance or compliance by a litigant leads to the litigant being punished for his reliance or compliance of the selfsame direction by the court, then surely there is a case for any judge or court to exercise judicial discretion to prevent injustice.

In my judgment, the Court of Appeal is clearly wrong in upholding the preliminary objection by the respondent that the appellant had failed to obtain leave to file the supplementary record of appeal out of time. The order of striking out the appeal with costs is erroneous. I have no hesitation in answering the second question in the positive. On this question alone, the appeal can be allowed and the case should be remitted to the Court of Appeal for hearing on the merits.

In view of my finding on the second question, is there any necessity for this court to specifically answer the first question? This is a clear case where injustice has been done to the appellant who has been denied his right to have his appeal heard on its merit. This court has 'the inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court' (see r 137 of the RFC). Litigants who come to court and obey its directions should not be punished for such obedience. And, if unfortunately on the rare occasion a

- A** litigant is unjustly punished, this court does have the jurisdiction and the power to correct that injustice.

- Substantial justice having been done by restoring the appellant's right to appeal in the Court of Appeal, I think it is neither necessary nor appropriate on the peculiar facts of this case to answer the first question, and in the process, making an excursion into the law to review the Federal Court decision in *Lam Kong*, which was reaffirmed by the Federal Court in *Capital Insurance Bhd v Aishah*, though counsels have argued extensively on this issue in the course of their submissions on the first question. For the present moment, I would like to briefly state that I find it quite difficult to agree with the majority judgment in *Lam Kong*. I am personally much more persuaded by the dissenting opinion expressed therein by his Lordship Chong Siew Fai, the then CJ (Sabah & Sarawak).
- B**
- C**

- The Court of Appeal is created to confer any litigant dissatisfied with the decision of the trial judge in the High Court the constitutional right of appeal to an intermediate appellate body (the Court of Appeal) and thence to the final appellate body (the Federal Court). Article 121(2)(a) of the Constitution clearly confers on the Federal Court the 'jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof, qualified by art 128(3) of the Constitution that such jurisdiction shall be as provided by federal law. Article 128(3) of the Constitution is the enabling provision in the Constitution that allows federal law to regulate the exercise of the jurisdiction of the Federal Court conferred on it by art 121(2)(a) of the Constitution, ie to allow federal law to be made to provide for rules, procedure or conditions (including the question of leave, etc) to ensure the proper exercise of the Federal Court's jurisdiction. Article 128(3) of the Constitution cannot be interpreted as allowing federal law to fetter the jurisdiction of the Federal Court to hear any appeal on the merits from the Court of Appeal emanating from a decision of the High Court or a judge thereof. A harmonious interpretation of art 128(3) vis-à-vis art 121(2)(a) of the Constitution, will promote the purpose or object of the law providing for a three tiered pyramidal judicial system of 'one trial + two appeals' as envisaged in the Constitution and structured accordingly in the CJA.
- D**
- E**
- F**
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In our present case, leave to appeal to the Federal Court, based on the two questions posed, was granted by the Federal Court on 17 April 2001. This appeal was heard by us in open court on 23 July 2001. To me, leave was correctly given and this appeal case, MPRS No 02-8-2001(W), is properly brought before the Federal Court.

- H** The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seized of jurisdiction over the case. So seized, the Federal Court must decide the case in the interests of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.
- I**

To sum up, as hereinbefore stated, I am answering the second question in the positive. In the circumstances of this case, I would allow the appeal

with costs and hereby order that the case be remitted to the Court of Appeal for rehearing on the merits, whether before the same or different panel of judges as the President of the Court of Appeal so directs.

Appeal allowed.

Reported by Peter Ling

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